IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Court's order whether the case is or not approved for reporting

(Chepter VIII, Rule 32(2)(b)

Description of Case

Criminal Misc Application No. 893 of 2001

Brijesh @ Baba Kapoor Lodge

Versus

Deen Dayal Verma & other

Date of Decision :- 21.7.05

~~**A.F.R. (Approved for Reporting)**~~

Not approved for reporting

Date :- 21.7.05 Initials of Judge

Note:- Bench Reader will attach this at the top of the first page of the judgment when it is put up before the Judge for signature.

HIGH COURT OF UTTARANCHAL AT NAINITAL

Criminal Misc. Appl. No.893 of 2001
{Old No. 3264/1995}

Brijesh alias Baba, Kapoor Lodge
S/o S.K. Ahmad
Tallital
District Nainital .....Applicant

Versus

1. Deen Dayal Verma
   S/o Ram Lal Verma
2. Smt. Basanti Devi
   W/o Deen Dayal Verma
   Both R/o Mount Rose Compound
   Tallital, District Nainital
3. State of Uttaranchal .....Respondents

Date:- 21st July, 2005

Hon'ble J. C. S. Rawat, J.

Heard Sri I. S. Khan and Sri Sayed Nadim learned counsel for the applicant and learned A.G.A. for the State. None appeared for the private respondents despite service.

2. The petition under section 482 Cr.P.C. was filed for quashing the order dated 27.9.1995 passed by the Pargana Magistrate in case No.33/1984 under section 145/146 Cr.P.C. and order dated 14.8.1995 passed by the S.D.M. Nainital and the report of the Tehsildar (Annexure-11 to this petition).

3. The factual position in a nutshell is that on 27.12.1983 on oral report was made to the Station Officer, Tallital, Nainital that there is breach of peace regarding the immovable property known as "Mount Rose Compound". It was alleged in the report that both the parties are claiming the possession over the disputed property. Feeling satisfied with the report, on

27.9.1984 the S.D.M. Tallital passed a preliminary order under section 145 Cr.P.C. Thereafter, on 16.11.1984 the S.D.M. Nainital passed an order of attachment of the property. Thereafter, the parties filed their written statements and adduced the evidence before the court below. When the statement of Puran Chand Joshi was being recorder, on 27.7.1995 an application was made by the respondent No.1 & 2 for inspection to see who was in possession over the disputed property. It was also prayed that the recording of evidence be stayed and be reopened after the inspection is made. Thereafter, on 14.8.1995 the S.D.M. Nainital directed the Tehsildar to make spot inspection and to give report on the points as to who was in possession and what were the boundaries over the land in dispute. On the basis of said direction, the Tehsildar made the spot inspection on 14.8.1995 and submitted it report that there were five rooms on the ground floor and five rooms on the first floor in the “Mount Rose Compound”. In the first floor, eight rooms were made after partition. Out of which, Anand Vallabh Upadhyaya was in possession of one room in the first floor and rest of the seven rooms Deen Dayal Verma & his wife Smt. Basanti Verma were reported to be in possession. In the second floor, two police constables were in possession of two rooms and Anand Vallabh Upadhyaya was also in possession of one room. Rest of the two rooms, one was vacant and the second room was in possession of Deen Dayal Verma. It has also been reported that the boundaries were materially different from the boundaries described in the preliminary order under section 145 Cr.P.C. and police challan. There is only dispute with regard to the two rooms. The matter was disposed of accordingly. Meaning thereby, the Magistrate has directed to

continue the proceeding in respect of disputed two rooms. The proceeding with regard to the rest of the properties was dropped.

4. Section 145(1) Cr.P.C. clearly provides that the Magistrate has to satisfy that there is an apprehension of breach of peace and secondly the Magistrate has to decide as to who was in possession within two months next before date on which the preliminary order was passed. If there is no apprehension of breach of peace, the Magistrate cannot proceed under section 145 Cr.P.C. After receiving the report of a police officer that there was an apprehension of breach of peace, the Magistrate has to decide as to who was in possession of the entire disputed property. The Magistrate should have proceeded with the evidence and instead of disposing of the matter, he acted beyond his jurisdiction and directed the Tehsildar to verify as to who was in possession at the time of the inspection.

5. The Magistrate should not have acted on the basis of the report submitted by the Tehsildar. He should have evaluated the evidence adduced by the parties. Even if, he has obtained the report, he should have allowed the parties to adduce their evidence. Thereafter, he should have decided whether the apprehension of breach of peace was there or he should have decided after appraisal of the evidence as to who was in possession within two month next before the date of preliminary order over the disputed property.

6. In view of above, the orders dated 27.9.1995 and 14.8.1995 passed by the S.D.M. Nainital are liable to be set-aside. Therefore, orders dated 27.9.1995 and

14.8.1995 passed by the S.D.M. Nainital are set aside. The case is remitted back with the direction to decide the case afresh in the light of the observations made above.

7. The petition is disposed of accordingly.

(J. C. S. Rawat, J.)

Dated 21.7.2005

LSR